

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE**

RUSSELL HENRY HASTINGS,)	
)	
Plaintiff/Appellee,)	Maury Equity No. 90-189
)	
vs.)	
)	
CAROLYN LOUISE HASTINGS,)	Appeal No. 01A01-9603-CH-00128
)	
Defendant/Appellant.)	

APPEAL FROM THE CHANCERY COURT OF MAURY COUNTY
AT COLUMBIA, TENNESSEE

THE HONORABLE WILLIAM B. CAIN, CHANCELLOR

For the Plaintiff/Appellee: _____ For the Defendant/Appellant:

Mark A. Free
Columbia, Tennessee

Christopher L. Dunn
Columbia, Tennessee

FILED
November 27, 1996
Cecil W. Crowson Appellate Court Clerk

**AFFIRMED IN PART, REVERSED
IN PART, AND REMANDED**

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

WILLIAM C. KOCH, JR., J.

OPINION

This is a divorce case in which the wife seeks payment of an asserted arrearage in child support. The trial court held that the husband had paid child support in accordance with the order in effect at that time, and dismissed the petition for arrearage. We affirm in part and reverse in part and remand.

Plaintiff/Appellee, Russell Hastings (Husband), and Defendant/Appellant, Carolyn Hastings (Wife), were married in 1977. Husband filed for divorce and an order of temporary child support for the parties' two minor daughters was entered on May 31, 1990. The May 31, 1990 order stated as follows:

It is therefore ORDERED, ADJUDGED and DECREED that the Defendant only pay temporary child support in the amount of \$694.08 per month pursuant to State guidelines. Pursuant to said guidelines, Plaintiff shall also pay thirty-two percent (32%) of any net income he receives under any quarterly cost of living bonus received from his employer, with said payments to be made as they are received by plaintiff.

Subsequently, after trial, a final order was entered on November 20, 1990, stating as follows:

Carolyn Louise Hastings is awarded custody and control of the parties' minor children subject to reasonable visitation privileges for Russell Henry Hastings from time to time as the parties may agree. Husband is further ordered to continue to pay Thirty-Two (32%) Percent of his net income as child support in accordance with state guidelines in the same fashion as he has been paying since the entry of the temporary order of support in this case.

Husband continued to pay \$694.08 per month, plus 32% of any cost of living bonus, as stated in the May 1990 Order of temporary support.

In March 1995, Wife filed a petition for an increase in child support. Wife asserted that she had learned that Husband was making substantial overtime income and was not paying child support based on the overtime. On April 7, 1995, the trial court entered an order stating:

IT IS HEREBY ORDERED that the Plaintiff be awarded the sum of thirty-two [percent] (32%) of the Defendant's base net income of \$3,283.00 per month as child support. The Defendant shall pay the sum of \$385.00 per pay period, plus the Clerk and Master's five-percent (5%) commission, via wage assignment.

IT IS FURTHER ORDERED that the Plaintiff will receive thirty-two [percent] (32%) of all additional net income of the Defendant, including, but not limited to, overtime and bonus pay.

IT IS FURTHER ORDERED that the Defendant provide to Plaintiff each and every pay period, a copy of his payroll stub.

Wife also filed a petition for arrearage in child support dating back to May 1990, approximately the date of the initial temporary order of child support. At the hearing on Wife's petition, Wife asserted that Husband misled her into believing that he was paying child support that reflected his overtime income, and that when she asked him for a pay stub to confirm his income, he refused. Husband denied misleading Wife about his overtime income, and stated that he did not provide her with a copy of his pay stub because he "didn't feel it was any of her business."

The record reflects that Husband's gross income for the years 1991 through 1994 was as follows:

1991 - \$57,054.50
1992 - \$56,097.44
1993 - \$92,418.84
1994 - \$104,852.51

Wife's gross income during this time period, excluding child support, was:

1991 - \$1,092
1992 - \$7,312
1993 - \$9,581
1994 - \$8,678

Wife also applied for and received food stamps for herself and the parties' two daughters.

The trial court examined the language in the May 1990 order of temporary child support and the language in the November 1990 final order. The trial judge noted that the May 1990 order required Husband only to pay a designated amount, \$694.08 per month, plus a percent of his net income from any cost of living bonus. He concluded that this clearly did not include Husband's overtime income. The trial judge then examined the language in the November 1990 order and concluded that it "says the same thing it said in the temporary order" and did not include overtime income. Consequently, the trial court dismissed Wife's petition for arrearage dating back to May 1990. Wife now appeals the dismissal of her petition for arrearage.

Wife contends on appeal that the trial court erred in interpreting the May 1990 temporary order and the November 1990 order to exclude overtime income. Husband asserts on appeal that Wife's claim of arrearage should be barred by the equitable defense of laches because she did not file the petition for arrearage until 1995.

The pertinent facts in this case are undisputed. The interpretation of the orders of the trial court below is a question of law. Since the issue on appeal involves purely a question of law, no presumption of correctness attaches to the trial court's judgment and our review on that issue is *de novo*. See *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Tennessee's child support guidelines provide:

(3) Gross income.

(a) Gross income shall include all income from any source (before taxes and other deductions), whether earned or unearned, and includes . . . the following: wages, salaries, . . . overtime payments. . . .

* * *

(4) Net income is calculated by subtracting from gross income of the obligor FICA . . . [and] the amount of withholding tax deducted for a single wage earner. . . .

Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(3)(a) and (4). "Overtime payments," therefore, would be included in "net income" unless the order of child support states otherwise.

The May 31, 1990 order of temporary child support specified that Husband was to pay "\$694.08 per month pursuant to State guidelines" plus 32% of "net income he receives under any quarterly cost of living bonus. . . ." The order further specified that the payments were "to be made as they are received by Plaintiff." The May 1990 order, then, sets forth a designated amount of money to be paid, with the percentage from the guidelines applicable only to income from Husband's quarterly cost of living bonus. Although the statement of designated payment amount is followed by the phrase "pursuant to State guidelines," the order as a whole does not appear to include overtime payments as a basis for Husband's child support payments. Accordingly, the decision of the trial court on the interpretation of the May 1990 order is affirmed.

The November 20, 1990 order states that Husband is ordered:

. . . to continue to pay Thirty-Two (32%) Percent of his net income as child support in accordance with state guidelines in the same fashion as he has been paying since the entry of the temporary order of support in this case.

Husband argues that the phrase "in the same fashion as he has been paying since the entry of the temporary order of support" in the November 1990 order means that Husband is obliged to pay only \$694.08 per month plus 32% of any cost of living bonus, as stated expressly in the May 1990 order. Such an interpretation is inconsistent with the direction in the November 1990 order to

pay 32% “of his net income . . . in accordance with state guidelines” Rather, the reference to the May 1990 temporary order appears to be an allusion to the phrase “with said payments to be made as they are received by Plaintiff,” that is, a reference to the manner of payment. As noted above, the term “net income” in the child support guidelines expressly includes overtime payments. Therefore, the November 1990 order directed Husband to pay 32% of his *entire* net income, including overtime payments.

Husband contends that Wife’s claim for arrearage should be barred by the doctrine of laches, since Wife waited until 1995 to file a petition for the arrearage. The doctrine of laches is discussed in *Archer v. Archer*, 907 S.W.2d 412 (Tenn. App. 1995). In that case, this Court stated:

Laches is based on the doctrine of equitable estoppel and is only applied where the party invoking it has been prejudiced by the delay. The essence of the defense is that a party has unreasonably and prejudicially delayed the asserting of a claim. Whether the defense of laches is applicable presents a mixed question of law and fact. The facts must establish negligence and unexcusable delay on the part of the party asserting a claim and some resulting prejudice or injury to the party pleading laches. The resulting question of law is whether, in view of the facts, it would be inequitable or unjust to the defendant to enforce the party’s right. Prejudice includes the loss of evidence, expenditure of money, change of value, or a change of a party’s right.

Id. at 416 (citations omitted). The trial court did not address this issue, since the trial court held that both the May 1990 and the November 1990 orders excluded overtime payments. However, the record in this case includes no showing of prejudice to Husband caused by the delay, such as a loss of evidence. Consequently, Wife’s claim for arrearage in child support is not barred by the doctrine of laches.

In sum, the trial court’s decision that the May 31, 1990 order excludes overtime payments is affirmed. The trial court’s decision that the November 20, 1990 order excludes overtime payments is reversed. Husband shall be required to pay any arrearage on overtime payments which were excluded from his calculation of his child support obligation from November 20, 1990 to the April 7, 1995 order. The case is remanded to the trial court for determination of the amount of arrearage and an appropriate payment schedule.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this Opinion. Costs are taxed to Appellee, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P. J., W.S.

WILLIAM C. KOCH, JR., J.